



Report of the
The Ombudsmen

for the year ended
31 March 1987

*Presented to the House of Representatives Pursuant to
Section 29 of the Ombudsmen Act 1975*

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ANNUAL REPORT OF JOHN F. ROBERTSON, C.B.E., CHIEF OMBUDSMAN

Mr Speaker,

I have the honour to submit my report on the work of the Ombudsmen for the year ended 31 March 1987.

My report includes comment on work undertaken by my late colleague, Lester Castle, C.M.G., whose untimely death on 26 November 1986 shocked and saddened me and all my staff. His contribution to the development of the role of the Ombudsman in New Zealand was significant, initially in the field of local government investigations and latterly in relation to reviews and investigations under the Official Information Act. In fulfilling his functions he was able to ensure that the inevitably more adversarial role of the Ombudsman under the Official Information Act was fully effective without affecting adversely the integrity of the traditional investigative role of the Ombudsman under the Ombudsman Act.

INTRODUCTION

The year began with 538 complaints on hand, 396 under the Ombudsmen Act and 142 under the Official Information Act. A further 1747 complaints were received under the Ombudsmen Act and 318 under the Official Information Act. In all, including a number of investigations reopened or new grounds of complaint added to existing files, a total of 2637 complaints were under consideration during the course of the year. Of those 2159 were disposed of and 478 (398 Ombudsmen Act, 80 Official Information Act) remained on hand at the end of the year.

A total of 699 complaints under the Ombudsmen Act were fully investigated or investigated as far as they usefully could be of which 261 or 37.5 percent were resolved or sustained. In addition a further 47 complaints were resolved by informal enquiry. Recommendations were made in 34 cases, two of which were declined. (see page 10).

Under the Official Information Act 323 requests were fully investigated and reviewed of which 193 or 60 percent were resolved or sustained. A further 11 requests were resolved informally. Recommendations were made in 10 cases, two were accepted in part only and two recommendations (involving the same information) were vetoed. (see page 18.)

Detailed statistical analyses of the complaints under consideration during the year are set out at page 23 et seq.

APPOINTING OMBUDSMEN

The appointment process for Ombudsmen was very much to the fore this year. After the tragic death of Lester Castle I continued alone through the end of the reporting year doing the best I could to ensure that a backlog of complaints did not arise. I was assisted a great deal by the splendid and special efforts of all my staff, but inevitably I felt

that time constraints reduced my ability to exercise to the highest extent the quality control which has been such a feature of the operations of the Ombudsman for 24 years.

It was tempting therefore to feel frustrated by the delay in the appointment of a replacement Ombudsman by the House of Representatives. However, it needs to be said that the customary securing of a unanimous resolution of the House recommending appointment to the Governor-General is a unique and powerful influence on the strength and independence of the Ombudsmen. The process ensures that representatives of all political parties in the House can face the recommendations of Ombudsmen, whether as Members of Parliament or as Cabinet Ministers, with confidence in the individual to whom they have entrusted this important office. That has been the real strength of the Ombudsman institution in New Zealand since its inception in 1962. While it is frustrating, when viewed from my perspective, to have long delays in the appointment process, no change should ever be contemplated because it has been consistently shown to be the right means of securing a person of the qualifications desired.

APPOINTMENT OF A THIRD OMBUDSMAN

At page 6 of his Report to Parliament for the year ended 31 March 1986, my predecessor referred to the question of the appointment of a third Ombudsman.

Following my appointment as Chief Ombudsman I reviewed the work of the office and came to the view that if, as expected, Parliament selected a second Ombudsman who preferably had a legal background which would fit well with the special requirements of the Official Information Act jurisdiction, the question of the appointment of a third Ombudsman could be deferred pending the enactment of the local government official information legislation currently before the House of Representatives. When that occurs, I will review the workload and consider the merits of the appointment of a third Ombudsman as against those of increasing the investigating staff.

LEGISLATIVE AND PARLIAMENTARY ISSUES

1. Submissions on Bills before Parliament

In the course of the year the late Mr Castle and I made submissions on a number of Bills before Parliament.

(a) Official Information Amendment Act 1987

Mr Castle was given an opportunity to comment on the draft legislation before its introduction into the House of Representatives, and he therefore limited his submissions to the Justice and Law Reform Select Committee on the Official Information Amendment Bill to those aspects of the legislation which particularly affected the workings of the office. Investigating staff attended the Select

Committee hearings. This provided a valuable opportunity to hear feedback on the operation of the Act and to identify areas where difficulties were perceived or experienced by departments and organisations.

The Amendment Act received the Governor-General's assent on 23 February 1987 and comes into effect on 1 April 1987. It includes consequential amendments to sections 19 and 21 of the Ombudsmen Act which will ensure that in cases where a "secrecy" provision is invoked the Ombudsman will be able to see the information at issue. (See page 17). It also extends the provisions of the principal Act to education authorities, universities, hospital and area health boards.

(b) *Police Complaints Authority and Miscellaneous Amendments Bill*

At page 4 of his report for the year ended 31 March 1986 Mr Castle referred to the question of the Ombudsman's jurisdiction over complaints against the Police. During the course of the year Mr Castle appeared before the Officials Committee established by the Minister for the purpose of drafting legislation to establish an office of independent examiner of Police complaints. He provided statistical information about Police complaints over the previous three years and discussed with the officials the various alternatives under consideration. Following the introduction of the Bill into the House of Representatives I made written submissions to the Justice and Law Reform Select Committee. The principal issues canvassed in those submissions are

- (a) that this was the first occasion since the office was established that an organisation was being removed from the Ombudsmen's jurisdiction.
- (b) that, on a number of occasions, my predecessors had drawn Parliament's attention to the deficiencies in the Ombudsmen's legislation in relation to complaints involving the Police which, if removed, would provide the Ombudsmen with effective powers to investigate such complaints. The powers which the Bill now proposes to vest in the Authority are essentially those which, if vested in the Ombudsmen, would, with the proposed resources, have enabled them to investigate effectively Police complaints.
- (c) that the proposed shared jurisdiction between the Ombudsmen and the Authority required greater definition to ensure that each had a clearly defined area of operation, and that neither was placed in a subservient role.

I endorsed the view expressed by my predecessor who said to the Officials Committee:

"I want to make it explicit that it is not my desire to hang on to the jurisdiction come 'hell or high water'. I would not lose too much sleep over it if it were shifted."

I also made a number of other submissions aimed at ensuring that the 24 years' experience of the office in investigating complaints directed at the Police were available to Parliament to consider in relation to the Bill. As at 31 March 1987 I have not appeared before the Committee to speak to my submissions.

(c) *Local Government Official Information and Meetings Bill*

The working party on official information in local authorities (mentioned at page 9 of the Annual Report for the year ended 31 March 1986) released a report in June 1986, and the Local Government Official Information and Meetings Bill was introduced into the House of Representatives on 26 November 1986.

Because of the advisory role which this office had played in the working party's deliberations, it was not necessary for any submissions to be made to the Justice and Law Reform Select Committee to whom the Bill was referred for study. Nevertheless, before the Bill was introduced Mr Castle and I made known to the Ministers of Justice and Local Government our opposition to the concept embodied in the Bill as introduced whereby the power to veto an Ombudsman's recommendation for release of official information rests with the Minister of Local Government, after consultation with the president of the relevant national association of local authorities. Our argument was based on the views that:

- (i) It is constitutionally sound for the veto to reside with those local authorities which are locally elected and, therefore, locally accountable; and
- (ii) the involvement of the Minister of Local Government (having no direct accountability in respect of the complaints under investigation) could give rise to ill-feeling between local and central government, and possibly have a flow-on effect on how Ombudsman's recommendations under the Ombudsman Act and in relation to personal information were viewed.

In addition we pointed out that we had difficulty seeing what legitimate interest the president of the relevant national association of local authorities might have in whether or not an Ombudsman's recommendation should be accepted, and we noted that disclosure to such a person would increase the possibility of breach of the confidentiality of the Ombudsman's investigation. We also envisaged practical difficulties with the suggested procedure, in particular, in relation to the time that would be needed to acquaint the Minister and the president of the relevant national association with the relevant information.

From my experience of dealing with local authorities under the Ombudsman Act, I have no reason to believe that they will exercise the power of veto irresponsibly in respect of recommendations made in connection with investigations under the local government official information legislation.

(d) *Other Bills*

Representations were made to the Parliamentary Select Committee and to Parliamentary Counsel respectively on minor aspects of the State Enterprises Restructuring Bill and the State-Owned Enterprises Bill.

At the suggestion of the Deputy Prime Minister, representations were made to the relevant Ministers in relation to a number of Bills establishing new authorities pointing out the omission to provide for the Ombudsman's jurisdiction over them.

2. Regulations Review Committee

Mr Castle was invited in October to attend a meeting of the Regulations Review Committee. The Committee is responsible for reviewing regulations and such other rules etc. as come within the scope of the Regulations Act. The Committee was interested in learning the extent to which this office has been involved in considering amendments to regulations. He was able to outline the extent to which the office had been involved in amendments to regulations.

3. State Enterprises — review of jurisdiction after 2 years

One of the many issues which arose in the context of the reorganisation of the State sector was whether the new organisations should be subject to the jurisdiction of the Ombudsmen under the Ombudsmen Act and the Official Information Act. At the same time there were moves by existing State enterprises in corporate form to have their position reconsidered, in particular as to the continued application of the Official Information Act.

Mr Castle and I took the opportunity to make representations to the Minister of Justice explaining why in our view the State enterprises should be subject to the Ombudsmen's jurisdiction. In essence we advanced three main arguments:

(a) The generally accepted principle clearly established by the late Hon. J. R. Hanan when introducing the legislation setting up the first New Zealand Ombudsman:

“The public will certainly expect a body which in its eyes is a government body to be subject to the jurisdiction of the (Ombudsman)”.

(b) State enterprises are clearly seen as government organisations in this test, and all have a social purpose which was instrumental in keeping them as government bodies rather than being sold off to private enterprise.

(c) As such there is a clear overview role for Parliament which can be partly exercised through its officers. Removal from departmental status to corporate form has materially reduced the impact of Ministerial control and thus reliance on the traditional obligations of Ministerial responsibility for

accountability has been diminished. The need for increased attention by Parliament therefore assumes considerable importance in the accountability process, and this fully justifies the Ombudsman's jurisdiction under both the Ombudsmen Act and the Official Information Act. The prime roles of the Ombudsmen in relations between persons and the State, and in the furthering of open government, are thus seen to be an important contribution to the accountability of State enterprises to Parliament.

In the event the position of existing State enterprises is unchanged, and the nine new enterprises will be subject to the Ombudsmen's jurisdiction also. However, that jurisdiction will be subject to review after 1 April 1989 by a specially convened Select Committee of the House of Representatives. In view of this I will be monitoring carefully investigations involving State enterprises and noting difficulties as they arise, so that information will be available to the Select Committee considering the practical results of the Ombudsmen's jurisdiction in this area.

4. A Select Committee of the House of Representatives to assist the Ombudsman's function?

Much has been written by Ombudsmen around the world about their relationships with Parliament. Many complain that little notice is taken of what they write in Annual Reports, or in special reports on particular topics which are submitted to Parliament. On the other hand, the same Ombudsmen are wary of a closer relationship with Parliament because of the potential this might have to fetter the independence of the Ombudsman.

The Ombudsman needs the full support of Parliament for his or her independence of action. In New Zealand, the House of Representatives has always given this support. No attempt has ever been made to fetter this freedom of action or to discredit the decisions which an Ombudsman has taken. However, it seems to me that the Ombudsman's relationship with Parliament can be improved to the benefit of the independent role which the Office has to fulfil.

Since the office was established in 1962 few recommendations made by the Ombudsmen have been turned down. However, where they are I believe there is a sound constitutional argument for requiring the department or organisation concerned to explain itself to Parliament. The establishment of a Select Committee of the House to consider those cases would enhance Parliament's function in enforcing accountability and would show, by its support of the Ombudsmen, the value it places on the role of its officers of Parliament.

The Committee could also be charged with the task of examining the annual budgetary requirements of the office and considering issues raised by Ombudsmen in Annual Reports or special reports to Parliament.

I therefore commend to the House the setting up of such a Committee with appropriately worded terms of reference.

ISSUES OF INTEREST ARISING FROM INVESTIGATIONS UNDER THE OMBUDSMEN ACT

1. Reviewing the State Services Commission's decisions to reject Ombudsmen's recommendations

Two recommendations which I made this year were rejected. Both involved the State Services Commission. In one case I recommended approval of an application for paid leave under the existing policy for sporting and cultural events for the leader of a New Zealand mountaineering expedition which had been granted Sport and Cultural Ambassador status (see page 13) and in the other payment of an employee's superannuation contributions while on secondment to the Papua New Guinea Government in accordance with a written undertaking that they would be paid.

Section 22(4) of the Ombudsmen Act provides that if no action is taken to give effect to a recommendation, an Ombudsman may send a copy of the report and recommendation to the Prime Minister and may thereafter report to Parliament. However, recourse to those provisions in relation to recommendations to the State Services Commission on individual employment related matters is a totally nugatory exercise.

Section 10(1) of the State Services Act requires the Commission, "in matters relating to decisions on individual employees", to act independently of the Minister. Thus the minister cannot issue directions on an Ombudsman's recommendations. Section 76 of the State Services Act makes it an offence for any person to influence the Commission in respect of decisions taken subject to Section 10(1) of the Act, so that even the Prime Minister would offend if he purported to review a decision of the Commission on a recommendation of the Ombudsman on a matter affecting an individual public servant. I am aware that the purpose of this legislation is to protect the Public Service from political patronage but I do not accept that the Commission's decisions on an Ombudsman's recommendations should not be reviewable. I believe that the House of Representatives should either amend the State Services Act to allow those decisions to become subject to Ministerial or Prime Ministerial review, or have the Commission attend before a Select Committee of the House as suggested at p. 9 to explain its reasons for the refusal.

2. Duty of Care

When a person seeks advice from a department or organisation about a matter for which that department or organisation has statutory responsibility, that person will expect to be able to rely on the advice received. There is, therefore, an onus on the department or organisation concerned to ensure that it gives complete and accurate advice, and to accept responsibility for its mistakes,

particularly where the advice is given in writing. A number of complaints were received from individuals who had sought advice, for example, from the Customs and Inland Revenue Departments and the State Services Commission, sometimes verbally and on other occasions in writing, only to find the advice received had been given on the basis of a mistaken view of the legislation, regulations, or departmental rules, or incomplete information from the requestor. Thus, before giving advice, departments and organisations should make sure they have sufficient facts to enable them to give accurate advice. Those seeking advice should try to give as full a picture as possible of the matter on which they are seeking advice. They should also bear in mind that rules change and advice given one year may not apply the next. In most cases where I concluded genuine misunderstandings had arisen I was able to achieve a remedy in the complainant's favour.

3. Marine Farming Leases

As a result of an extensive and protracted investigation, begun in 1983 by the then Chief Ombudsman and completed, following Mr Castle's death, by me, into the procedures followed by the Ministry of Agriculture and Fisheries in relation to the issue of marine farming leases under the Marine Farming Act 1971, a number of disturbing features came to light from an examination of the history of one particular case.

These included: an inordinate delay (eight years) in considering the application; an omission to provide the Minister with known information about the applicant's intentions and ability to develop a lease; an omission to make up to date enquiries about the applicant's development proposals before submitting the case to the Minister; and an omission to have regard to the applicant's previous history of assigning leases for consideration without developing them.

After identifying the above administrative deficiencies and discussing them with the Ministry, I recommended that a number of procedural changes be made to speed up the processing of applications and to eliminate the possibility that new leases would be traded before the required development had been completed. The changes were also aimed at establishing whether or not the applicant intended and had the necessary expertise to develop the lease. The Ministry decided in the light of those recommendations to pursue and complete a comprehensive review of the Marine Farming Act 1971.

4. Other Investigations Resulting in Legislative Amendments

(a) Public Works Act 1982

I conducted an extensive investigation into a complaint from the former owner of a piece of land, which had been acquired by the Crown for school purposes but which had become surplus to requirements, that the Ministry of Works and Development had failed to observe correctly the procedures set down in section 40 of the

Public Works Act, thereby denying her the opportunity to repurchase the property. As a result of that investigation, the Commissioner of Works advised me that because of the inordinate difficulties which officers had encountered in the administration of section 40, extensive legislative changes were proposed to prevent the recurrence of the situation which had arisen in the complainant's case and also to remedy various other perceived defects in the existing legislation.

In addition to the legislative amendments contemplated by the Ministry, I recommended:

"That the Department consider an amendment to sections 40(2)(c) and 42(1)(c) of the Public Works Act 1981 which will provide for the value determined by the registered valuer of the land to be disposed of to be regarded as the minimum or reserve price and not the nominated purchase price. That price to be the subject of negotiations of the kind usually employed for the disposal of land where there is a willing seller/buyer relationship."

(b) *Citizenship Act 1977*

In May 1986 my predecessor completed the investigation of a complaint directed at the refusal of the Department of Internal Affairs to accept the complainant's daughter's birth certificate issued by the Registrar General in Perth, Western Australia, as proof of his paternity for the purpose of an application for her to be issued with a New Zealand passport. The complainant considered the decision to be unreasonable because the alternative means of establishing paternity, involving Court proceedings in both New Zealand and Australia, were lengthy and expensive.

Mr Castle formed the opinion that although the department's decision was lawful, it was made in accordance with the provision of an enactment, namely, section 3(1) of the Citizenship Act, which was unreasonable and unjust because it limits proof of paternity to the means prescribed in section 8 of the Status of Children Act 1969. Mr Castle therefore recommended that the department promote an amendment to section 3 of the Citizenship Act to provide the department with a discretionary authority to accept in appropriate cases a statutory declaration by the father of a child together with a foreign birth certificate as proof of paternity. This proposal would allow a sufficient guarantee of authority, certainly as much as that guaranteed by the joint declaration of mother and father as provided under section 8(2) of the Status of Children Act.

The Ministry of Works and the Department of Internal Affairs agreed to take the necessary steps to give effect to the recommendations. However, because of the heavy legislative programme for the current year, and the need for consultation with other departments, the necessary amendments will not be considered in the current Parliamentary session.

I will be keeping a watching brief on progress in both cases.

5. Special Leave for Sporting and Cultural Events

Subject to certain criteria State servants may be granted paid leave to represent New Zealand in sporting and cultural activities at an international level. Because the policy is selective, and seems to be based on an evaluation of the national importance of a particular sport, it is far from clear, especially to the Ombudsman and those affected, how justice is done in the actual consideration of cases. In previous years my colleagues and I have had to address this issue as well as what constitutes a sport, and this has contributed to successive reviews of the policy. I am still not satisfied that the resultant policy is crisp or precise enough to enable the exercise of approval or non approval to be reviewed as part of the accountability process. The following example illustrates the problem being faced.

This year I considered a complaint from a State servant who had applied unsuccessfully for paid leave to lead a New Zealand expedition to Mount Everest. Mountaineering is not on the list of sports approved by the State Services Commission but the expedition had been accorded Sport and Cultural Ambassador status and had been selected on a national basis. The complainant therefore sought leave under the policy.

On the basis of the material available to me I formed the view that the decision not to grant the applicant paid leave was unreasonable and I therefore recommended that the leave be approved. The Chairman of the State Services Commission advised me he was not prepared to act on my recommendation and, for the reasons referred to at p....., I was not able to resort to the provisions of section 22 (4) of my Act.

This case demonstrates that the policy for granting special leave in the State Services for sporting and cultural events is highly subjective. Indeed, the policy is almost unworkable in practice and difficult for those affected by it to understand. For instance, at the time when the Commission rejected my recommendation, paid leave was approved for another State servant to represent New Zealand overseas at ten pin bowling.

6. Absence of clear jurisdiction to take complaints from Tokelau people living outside New Zealand against decisions of New Zealand Government instrumentalities

I received a complaint from an officer in the Tokelau Public Service concerning the decision of the Official Secretary in the Office for Tokelau Affairs (situated in Apia, Western Samoa) to deny the complainant subsidised housing which the advertisement for the position to which he had been appointed stated would be available. After taking up the position he was told that the general policy was to supply houses to staff who did not have accommodation. The complainant was living in a house which was made available by his

family and because of this he was deemed ineligible for subsidised housing. He considered the decision to be unreasonable.

I gave notice of my investigation to the Chairman of the State Services Commission on the premise that the Official Secretary was exercising a power, the authority for which was to be found in directives or instructions originating in the Commission and communicated to the Official Secretary pursuant to section 7 of the Tokelau Amendment Act 1967. I took the view that his decision could therefore be investigated under the Ombudsmen Act.

The Commission queried whether the Ombudsman had jurisdiction to investigate a matter relating to the Tokelau Public Service. It argued that because the action complained of took place outside New Zealand I had no jurisdiction and, further, that because the Tokelau Public Service, the Office for Tokelau Affairs and the Administration of Tokelau are not mentioned in the Ombudsmen Act, Parliament did not intend that Tokelau should be subject to the Ombudsman's jurisdiction. I was told that the Commission was seeking a full legal opinion from an expert in the field.

A round of legal argument followed, the end result of which was that the legal position was at best uncertain and, as I saw it, could only be resolved by my seeking either a declaratory judgement from the Court or a legislative change. After considering those options, I concluded that given the resources available to me, the circumstances did not warrant my committing any to the former and the latter, even if successful, would not have retrospective effect and would not therefore enable me to help the complainant. I therefore decided not to pursue the matter in the Courts. However, I did ask the Chairman to give the complainant's case sympathetic consideration. Tokelauans are New Zealand citizens and it seems to me that there is a case for them having the constitutional right to have their grievances about decisions of government bodies in New Zealand considered by an Ombudsman. Instead of seeking a remedy in the Courts, it seems to me that the legislation should be reviewed, after an appropriate government policy decision has been made.

7. Examination Assistance

A complaint that the New Zealand Trades Certification Board refused unreasonably to allow a recent refugee immigrant, who was seeking to become a qualified motor mechanic, reader/writer assistance, led me to the view that the Board's policy for granting examination assistance was unfair if not improperly discriminatory because it enabled students suffering from dyslexia or non-manifest handicaps to receive reader/writer assistance, while denying similar assistance to students for whom English is a second language. If New Zealand is to accept into the community persons of refugee status, there is an accompanying obligation on all sectors of society, including agencies such as the Trades Certification Board, to ensure

they are assisted to integrate into the New Zealand work force as quickly as possible.

At my request the Board, in consultation with the various sector groups represented in its membership, reconsidered its policy. I suggested that it look at granting extra examination time for those students for whom English is a second language. I did not consider that such a provision would detract from the Board's examination standards, but it would give recognition to the difficulties faced by such students in attempting examinations so early in their new life in New Zealand.

The Board informed me that with the exception of the Hairdressing Industry all were unwilling to agree to amend the policy for reasons relating to safety standards. I was disappointed with the outcome, but took some heart from the fact that the Board had agreed to allow students to use language dictionaries in its examinations.

8. Local Government — Complaints by Councillors About Council Actions.

Over the past year I have received a number of complaints from Councillors about procedures adopted by their Councils, for example, the contents of the minutes; procedural rulings by the Chairman; the refusal to accept a notice of motion; the failure to provide information.

While not wishing to deny an individual, who is also a Councillor, his or her constitutional right under the Ombudsmen Act to have a grievance about an administrative act or decision of a committee (other than a committee of the whole), sub-committee, officer, employee or member of a local organisation, investigated, I must also have regard to the special position of that individual as a member of the organisation against whom the complaint is directed. I do not consider that a Councillor should be able to seek redress from the Ombudsman where he or she has failed to persuade his or her fellow Councillors to support a particular issue, whether it be a notice of motion, a move to amend minutes or other business transacted at the Council table where the Councillor has an opportunity to be heard. I believe that would constitute an unwarranted intervention in the affairs of the Council. It is a matter of fact that under section 114 of the Local Government Act 1974 a Council is authorised to regulate its own proceedings and if there is a procedural dispute, Councillors must accept the majority view. That is a political fact of the democratic process.

On the other hand, if a Councillor seeks information from the council officers about matters relevant to Council business, the officers concerned should do their best to meet those reasonable requests or refer the Councillor to the appropriate source of the information sought.

ISSUES OF INTEREST ARISING FROM INVESTIGATIONS AND REVIEWS UNDER THE OFFICIAL INFORMATION ACT

1. Delays

In his last Annual Report my predecessor identified excessive delays as an impediment to the success of the review process under the Official Information Act. This year there has been some improvement, overall, in the speed with which investigations have been completed. This has been due in no small measure to the extension to all departments and organisations of new procedures which had been introduced on a trial basis during the preceding year. The procedures involve informal discussions taking place, as early as possible in an investigation, between investigating staff and officers of the department or organisation holding the information. They have been largely successful and many reviews have been resolved, often to the requestor's satisfaction, without the need for time-consuming written correspondence. I am also glad to say that the procedures have met with universal acceptance from departments and organisations involved with them.

However, a complaint cannot always be resolved by discussion and excessive delays continued to be experienced in some cases, undermining the review process. The problem was most apparent in cases involving requests made (often to Ministers) before important policy decisions were made and with a view to influencing the course of those decisions. Clearly it is of little comfort to requestors seeking urgent access to information with this purpose in mind that the holder of the information sometimes does not respond for weeks or even months, by which time the policy decisions in issue have been made and the opportunity for contribution to the policy-making process has diminished or been extinguished entirely. Similar failures to respond to enquiries by an Ombudsman only increase the frustration which members of the public must feel. In my view it is only consistent with the objective of open government to expect that every reasonable effort will be made to action urgent requests and, should they result in refusal and an Ombudsman's investigation, to provide a prompt response to the Ombudsman. Failing this, the intention of the Legislature and the requestor's rights under the Official Information Act may be frustrated.

The issue of delay was addressed by the Official Information Amendment Bill and was the subject of frequent comment during the debates and before the Select Committee. From 1 April 1987 section 15 of the Act imposes duties on the recipients of requests to respond within set time limits. Extensions of time limits will be subject to review by the Ombudsmen. Moreover, as a result of the Select Committee's deliberations, an Ombudsman will be able to require Ministers, departments and organisations to provide, within 20 working days, information which is needed for an investigation under the Act.

It is not altogether clear how these new provisions will work in practice. The danger exists, as recognised by the Danks Committee on Official Information, that the time limits will become the norm rather than the maximum time for answering requests, notwithstanding that the Act still requires that responses be made "as soon as reasonably practicable". Urgent requests are expressly contemplated by the Act. The success of the new provisions will be monitored closely over the coming year.

2. Secrecy Provisions

(a) Companies Act 1955

Mention was made at p. 10 of last year's Report of difficulties experienced where sections 18(c)(i) and 52(3)(b) of the Official Information Act are relied upon to decline a request, on the basis of a statutory provision apart from the Official Information Act. One provision in relation to which the difficulty was particularly apparent was section 9A(7) of the Companies Act 1955 which required the Registrar of Companies and others to maintain secrecy in all matters coming to their knowledge as a result of an inspection under section 9A(1). The subsection was nevertheless discretionary and permitted disclosure, in particular, to a person with a proper interest in the information or where disclosure was considered to be in the public interest.

I assumed responsibility from Mr Castle for investigating two decisions of the Registrar of Companies to decline requests for reports prepared under the authority of section 9A. In both instances the Registrar declined to supply the Ombudsman with the information in question as, in his view, the Ombudsman had no proper interest in it, and nor was it in the public interest for him to receive it to fulfil his functions under the Official Information Act. Without seeing the information it was difficult to reach a view as to whether the provision properly applied to the information. It was especially difficult to assess the factors which would be relevant to the exercise of the Registrar's discretion against disclosure without access to the information itself.

The Official Information Amendment Act repeals section 9A(7) and substitutes a new section 9AA. As a result of the amendment the issue of disclosure of both reports which had been requested may now be determined under the Official Information Act and my office will be entitled to access to them.

(b) Inland Revenue Department Act 1974

The second provision which gave rise to difficulties was section 13 of the Inland Revenue Department Act. Section 13(1) requires officers of that department to maintain secrecy in respect of all matters coming to their knowledge in the performance of their duties. Section 13(4)(f), however, gives to the Commissioner a discretion, in certain circumstances, to disclose information to the person in relation to whom it is held or was obtained. There was no difficulty

with the department making its files available to this office, with the consent of complainants, for the purposes of investigation. However, problems arose concerning the extent to which, if at all, the principles of the Official Information Act are relevant to the Commissioner's exercise of his discretion to disclose information under section 13 (4). A large number of requests by taxpayers seeking access to information about the inspection of their tax affairs remained unresolved pending the settlement of this question. In order to prevent further delay I decided to continue the investigations under the Ombudsmen Act, as relating to matters of administration, rather than under the Official Information Act. This enabled some progress to be made by the end of the reporting year; in the meantime the issue of the Commissioner's discretion and its relationship to the Official Information Act has been drawn to the attention of the Information Authority.

3. Ministerial Veto

During the reporting year there was one exercise of the ministerial "veto" on release of official information. Two parties had sought access to information held by the Ministry of Energy concerning the Rotokawa geothermal field in the central North Island. I recommended to the Secretary of Energy that certain information be made available to each requestor, but my recommendations were "vetoed" by the Minister on 13 March 1987.

4. Judicial Reviews

There has been little change since last year in either of the two cases awaiting hearing. Neither that brought by the Public Service Association nor the Court of Appeal proceedings in the Police briefs case (*Commissioner of Police v Ombudsman*) had been allocated a date for hearing as at the end of the reporting year.

5. Report of the Criminal Law Reform Committee on Discovery in Criminal Cases

The issue of what has loosely been described as "criminal discovery" is the subject of a report from the Criminal Law Reform Committee which was published in February 1987. The report suggests a formal code of pre-trial discovery in criminal cases. The recommendations of the Committee are welcomed as suggesting a constructive means of ensuring that the accused obtains access to information before trial. It is envisaged that, once the code is enacted, the Official Information Act would be amended to exclude its application in this situation.

In the meantime I am guided, pending appeal, by the decision of Mr Justice Jeffries in *Commissioner of Police v Ombudsman* in relation to section 6 (c) of the Official Information Act. That case contains a more restrictive approach to disclosure of information than that suggested by the Law Reform Committee.

6. Public Interest

One of the concerns which was expressed in the context of the repeal of section 8 of the Official Information Act was that withholding "commercial information" would need to be balanced in every case against the public interest in disclosure of the information under section 9(1) of the Act. It was noted that the public interest is open to wide and varied interpretation at the hands of an Ombudsman.

It is true that in every case where a withholding provision is invoked under section 9(2), the public interest must be considered, and that the public interest has many aspects. However, there are two features of the approach which has been adopted which can be identified.

First, section 9(1) of the Act envisages that the decision-maker, and the Ombudsman on any review, will balance the interest in withholding the information (represented by the reason invoked) against any identifiable interest in making it available. In the commercial sphere, where most concern has been expressed, the Ombudsman has to take account of the interest of the taxpayer in the operation of the government in a businesslike, efficient and profitable manner. It is indicative of this balancing process that in only one case to date has an Ombudsman formed the view that some other public interest outweighed the reasons for withholding what may be termed as commercial information.

Secondly, section 9(1) needs to be interpreted according to its legislative context, first and foremost, the principle of availability and the express purposes of the legislation. Those purposes give an important guide to the factors which may be relevant under section 9(1), in particular the promotion of accountability and public participation. The possibility that these interests can be met through some other means may be relevant to the balancing process.

Thus, although it is open to an Ombudsman, form the opinion that the public interest in a particular case outweighs the reasons for withholding the information, those who are subject to the Act ought to be able to assess with some degree of precision the possible arguments under section 9(1), in favour of release.

It should be noted as well that it has been the practice of successive Ombudsmen to seek comments on the public interest from requestors and holders of information so that in appropriate cases the relevant issues are canvassed as fully as possible before the Ombudsman forms a view on the balance in a particular case.

7. The Discretion to Withhold Personal Information

Section 27(1) of the Act, which allows personal information to be withheld for a number of reasons, is phrased in discretionary terms. It states that a department or Minister of the Crown or organisation "may refuse to disclose . . .". There is no obligation to rely on any of the reasons for refusal set out in paragraphs (a) to (h). The question

has arisen in several cases whether this discretion has been exercised reasonably. As a matter of law such a discretion may not be exercised in an arbitrary or capricious manner. It must be exercised for the purposes of the Act by which it is conferred, and fairly. In particular the decision-maker must give genuine consideration to the facts of each individual case.

One factor I have needed to consider in relation to the exercise of this discretion is that section 26 allows individuals to seek correction of personal information which they consider to be inaccurate or incomplete and misleading. Part of the scheme of the Act relating to personal information is to enable individuals to seek out and, if necessary, to have corrected information which is held about them which, if not corrected, could prejudice their future dealings with the department or organisation concerned. However, in order to challenge the accuracy of such information a person must first gain access to that information under section 24(1). It may therefore be highly relevant to the exercise of the discretion in section 27(1) that a requestor's right to challenge the accuracy and completeness of certain information would be denied if access to that information were refused. This factor would be particularly cogent if the information was clearly inaccurate or incomplete and gave a misleading impression.

8. Examples of Information Made Available as a Result of the Investigation and Review Process

- Research material compiled by TVNZ for a documentary on methods of treatment for drug addiction.
- A draft version of the Children and Young Persons Bill.
- Internal Police reports arising from complaints of Police action at an anti-apartheid demonstration.
- Abridged reports on the Maui gas reserves.
- A preliminary environmental impact study on a Railways quarrying operation.
- Individual statements by members of an appointment panel giving their reasons for not appointing one of the applicants.
- Trades Certification Board examination scripts, together with examiners' comments.
- Correspondence between the Ministry of Works and Development and the Department of Maori Affairs concerning planning applications for a proposed Kokiri Centre.

PUBLICITY AND PUBLIC AWARENESS PROGRAMMES

1. Visits to Other Centres

Investigating officers visited the following places during the year as part of the continuing programme of making the office known and accessible to people throughout the country: Dunedin, Greymouth, Westport, Hokitika, Kaikohe, Whangarei, Palmerston North,

Wanganui, Feilding, Marton, Hastings, Napier, Waipukurau. The visits are advertised in advance in the local papers, on the radio, and, where possible, through the local Citizens Advice Bureau.

2. Visits to Local Authorities

I continued my programme of calling on local authorities and statutory boards to make personal contact with elected officials and chief executives, visiting authorities and boards in the Wairarapa, the Hawkes Bay, the Waikato and the Thames Valley.

3. The Ombudsmen and the Pacific Island Community

At p. 17 of my last report I commented on the need to make a special effort to try to improve the effectiveness of the Ombudsman's role for the less advantaged groups in our society, in particular, Maori and Pacific Island communities.

During the year a programme was instituted aimed specifically at raising the awareness of Pacific Islanders living in Auckland about the role and functions of the Ombudsman. I am fortunate in having on my staff a respected member of the Samoan community who organised a sensitivity programme for all the staff and who assisted me in arranging with the Pacific Islanders Educational Resource Centre in Auckland a three day "clinic" to enable Pacific Islanders to come and discuss problems with members of my investigating staff. Advance publicity about the clinics, which were held at the Pacific Islanders, Educational Resource Centre in Herne Bay, at Nga Tapuwae College, Mangere and at the Samoan Methodist Church hall in Otara, was disseminated to the Pacific Island community in Auckland through the Resource Centre, church and community leaders, Radio New Zealand's Pacific Islanders Newsletter, and the local news media. The Director of the Resource Centre, without whose support the programme would not have been as highly successful as it was, hosted a dinner at the Centre in Herne Bay in honour of the occasion and this was an excellent opportunity for the Ombudsman's role to be emphasised to leaders in the Pacific Island community.

Although the number of individuals who took advantage of the clinics was not great, the exercise undoubtedly succeeded in raising the level of awareness about the office among Pacific Islanders. The exercise will be repeated and it is also proposed to run similar programmes in Wellington and Christchurch. In the meantime, contact with the community in Auckland is being maintained through regular visits to community leaders and by talking to schools and groups of community workers.

4. The Ombudsmen and the Maori Community

Preliminary discussions have been held to look at establishing a programme for the Maori community and I have been fortunate in being able to appoint to the staff an investigating officer who, in

addition to undertaking investigations, has the cultural background and skills to enable me to develop the programme in the coming year.

5. Poster and Pamphlets

A poster and two pamphlets entitled "How Your Ombudsman Can Help You" and "How Your Ombudsman Can Help You With Official Information" were published this year and have been distributed to all Members of Parliament as well as to Citizens Advice Bureaux and community law offices. A programme of visits by investigating officers to all Citizens Advice Bureaux throughout the country has been established with a view to making personal contact with each Bureau and ensuring the helpers in each Bureau know the role and functions of the Ombudsman.

OVERSEAS VISITS

Both Mr Castle and I attended the 9th Conference of Australasian and Pacific Ombudsmen in Tasmania.

OVERSEAS VISITORS

The Minister of Justice for Zimbabwe, the Hon. Dr Zvobgo and his wife, Mrs Julia Zvobgo, visited the office in May 1986. Dr Zvobgo was interested in the work of the Ombudsman and the effectiveness of the office.

STAFF

It is with regret that I record the death on 9 March 1987 of John Hudson. John Hudson was the Senior Investigating Officer in the Auckland Office of the Ombudsman, a position he had held since the office was established in 1976. The success of the Auckland office since its establishment is attributable in no small part to John's contribution and his expertise in the field of local government will be greatly missed.

I also record my thanks to all the staff for the tremendous support they gave me following Mr Castle's death. Without that support and their hard work I would not have been able to carry the total responsibility for the work of the office as effectively as the results demonstrate.



JOHN F. ROBERTSON, C.B.E. Chief Ombudsman.

STATISTICAL ANALYSIS OF OMBUDSMEN ACT

INVESTIGATIONS FOR THE YEAR 1 APRIL 1986 TO 31 MARCH 1987

Summary

Complaints received during the year:					
Office of the Ombudsman, Auckland	..	..	..	245	
Office of the Ombudsman, Christchurch	..	..	..	236	
Office of the Ombudsman, Wellington	..	..	..	<u>1 266</u>	
					1 747
Complaints carried forward from the previous year:					
Office of the Ombudsman, Auckland	..	..	..	73	
Office of the Ombudsman, Christchurch	..	..	..	63	
Office of the Ombudsman, Wellington	..	..	..	<u>264</u>	
					400
					<u>2 147</u>
Distribution of Complaints					
Central Government departments (Part I)	..	..	..	1 134	
Organisations other than local organisations (Part II) (Statutory Boards)				288	
Local organisations (Part III) (Local Government)	..	..	..	595	
Organisations outside jurisdiction	..	..	..	<u>130</u>	
					2 147
Disposition of Complaints					
Total number of complaints (2147) under action during the year were dealt with as follows:					
Resolved by department or organisation —					
Investigation discontinued	..	..	..	168	
Sustained:					
No recommendation warranted or appropriate	..	..	..	59	
Recommendation made and accepted	..	..	..	32	
Recommendation made and declined	..	..	..	<u>2</u>	
					93
Not sustained	..	..	..	358	
Investigation discontinued — further inquiry not warranted			..	80	
Declined — No jurisdiction:					
Organisation not within jurisdiction (explanation/assistance given)			..	191	
Actions of Trustee	..	..	..	8	
Referred to Police for internal investigation first	..	..	..	<u>36</u>	
					235
Declined pursuant to Ombudsman's discretion:					
Right of appeal to Court or tribunal	..	..	..	56	
Adequate remedy under law or administrative practice reasonably available	..	..	..	<u>245</u>	
Time lapse, frivolous or vexatious, insufficient personal interest	..	..	..	<u>7</u>	
					308
Formal investigation not undertaken —					
Resolved by informal enquiry	..	..	..	47	
Explanation/advice/assistance provided to complainant	..	..	..	<u>352</u>	
Additional information sought from complainant but not provided				<u>108</u>	
					507
Under investigation	..	..	..	<u>398</u>	
					<u>2 147</u>

INVESTIGATIONS FOR THE YEAR 1 APRIL 1986 TO 31 MARCH 1987 — *continued*

			Part I	Part II	Part III	No Jurisdiction	Total
Resolved by organisation	..	..	100	22	46		168
Sustained — no recommendation made			35	6	18		59
Sustained — recommendation made	..	..	19	4	11		34
Not sustained	..	..	158	48	152		358
Discontinued	..	..	32	8	40		80
Declined	..	..	280	67	66	130	543
Formal investigation not undertaken	..	..	301	79	127		507
On hand	..	..	209	54	135		398
TOTAL	..	..	1 134	288	595	130	2 147

STATISTICAL ANALYSIS OF OFFICIAL INFORMATION ACT

INVESTIGATIONS AND REVIEWS FOR THE PERIOD 1 APRIL 1986 TO 31 MARCH 1987

Table 1*Nature of Decisions Complained of*

Refusals	..	..	..	..	..	211
Delays	..	..	..	..	..	75
Corrections	..	..	..	..	..	11
Deletions	..	..	..	..	..	4
Charges	..	..	..	..	..	12
Transfers	..	..	..	..	..	5
						<u>318</u>

Table 2*Nature of Requestors*

Media	Individuals	Members of Parliament	Special Interest Groups	Companies and Incorporated Societies
18	177	1	25	30

Table 3*Distribution of Investigations and Reviews (Cases under action during the year)*

Complaints against

Ministers of the Crown	..	..	..	..	39
Departments listed in Part I of Ombudsmen Act			..	..	299
Organisations listed in Part II of Ombudsmen Act			..	..	91
Organisations listed in First Schedule to Official Information Act			..	..	52
Non-scheduled organisations (no jurisdiction)	..	..	..	..	9
					<u>490</u>

Table 4*Disposition of Investigations and Reviews*

Total number of investigations and reviews (490) under action during the year were dealt with as follows:	
Resolved by Minister, department or organisation —	
Investigation discontinued 181	
Sustained:	
No recommendation warranted or appropriate 2	
Recommendation made and accepted 8*	
Recommendation made and declined -	
Recommendation made and vetoed 2	
	12
Not sustained	66
Investigation discontinued:	
Further enquiry not warranted 40	
Referred for investigation under Ombudsmen Act 24	
	64
Declined:	
Organisation not within jurisdiction 6	
Decision does not fall within Ombudsman's function, s.28(1) 1	
	7
Declined pursuant to Ombudsman's discretion:	
Adequate remedy under law or administrative practice reasonably available 8	
Formal investigation not undertaken:	
Resolved by informal enquiry 11	
Explanation/advice/assistance given 43	
Not pursued by requestor 18	
	72
Still under investigation 80	
	490

* In part only

Requests received in year to 31 March 1987†

1986	April	..	..	..	..	33
	May	..	..	..	..	30
	June	..	..	..	..	25
	July	..	..	..	..	33
	August	..	..	..	..	29
	September	..	..	..	..	24
	October	..	..	..	..	17
	November	..	..	..	..	32
	December	..	..	..	..	17
1987	January	..	..	..	..	22
	February	..	..	..	..	18
	March	..	..	..	..	38
						318

† Includes multiple requests by one requestor

Vote: Office of the Ombudsman Expenditure 1 April 1986 — 31 March 1987

A summary of the amount appropriated and spent in the 1986-87 financial year is as follows:

	1986-87				1985-86	
	Appropriated (\$000)		Spent (\$000)		Spent (\$000)	
Personnel	1 061	962
Operating costs	274	256
Capital	34	33
GST	68	47
TOTAL	1 437	1 298
						912

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